

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

MARK A. COLE,)
)
Petitioner,)
)
v.) Civ. No. 23-03373-CV-S-RK
) Crim. No. 6:18-03022-01-CR-S-RK
UNITED STATES OF AMERICA,)
)
Respondent.)

ORDER GRANTING MOTION FOR POSTCONVICTION RELIEF

Before the Court is Movant's motion for postconviction relief pursuant to 28 U.S.C. § 2255. Considering the Eighth Circuit's decision in *United States v. Myers*, 56 F.4th 595 (8th Cir. 2023), and the government's response to the § 2255 (Civ. Doc. 5)¹, the motion is **GRANTED**, Movant's sentence is **VACATED**, and this matter will be set for **RESENTENCING**.

On February 20, 2018, Movant was indicted on one count of being a felon in possession in violation of 18 U.S.C. § 922(g)(1) and 924(e)(1), the sole count in the Indictment. (Crim. Doc. 1.) On March 12, 2018, Movant was arrested, and on June 20, 2018, he pleaded guilty. (See Crim. Doc. 20.) At that time, the maximum sentence for violating § 922(g) was ten years, subject to application of the Armed Career Criminal Act (the "ACCA"), which required that the minimum sentence would be 15 years if the defendant had three or more prior convictions for violent felonies or "serious drug offense[s]." 28 U.S.C. § 924(e)(1). The Court determined the ACCA applied and, on November 16, 2018, sentenced Movant to 204 months' imprisonment to be followed by five years' supervised release. (See Crim. Doc. 35.)

Approximately 5 years later, the Eighth Circuit in *Myers* held that a prior conviction under Mo. Rev. Stat. § 195.211 (2000) involving the felony sale of cocaine does not qualify as a predicate offense for application of the ACCA. 56 F.4th at 598-99. The parties agree that *Myers* establishes the ACCA does not apply to Movant (having a prior conviction under Missouri law involving methamphetamine that the government "does not dispute" should be analyzed similarly to

¹ "Civ Doc." refers to Movant's civil case, No. 23-cv-03373-RK, and "Crim. Doc." refers to Movant's criminal case, No. 18-cr-03022-RK-1.

Missouri cocaine). (Civ Doc. 5 at 3.) As a result, Movant's sentence cannot exceed ten years, and therefore Movant's sentence should be vacated under *Myers*. The Court agrees.

The Probation Office is directed to prepare an updated Sentencing Guidelines calculation as a supplement to the already existing Presentence Investigation Report. A sentencing hearing will be set at a future date.

IT IS SO ORDERED.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: January 24, 2024